ALL KURMA SDN BHD v. TEOH HENG TATT & ORS

HIGH COURT MALAYA, PULAU PINANG
KENNETH ST JAMES JC
[CIVIL APPEAL NO: PA-22NCC-30-09-2021]
5 AUGUST 2022

Abstract – *The plaintiff applying for a Mareva injunction must endeavour to satisfy the requirements under O. 29 r. 1(2) and (2A) of the Rules of Court 2012 in order to succeed in the application; mere regurgitation of the words in the Orders, without adequately particularising the facts and the reasons, would not suffice. Likewise, in order for the ex parte Mareva injunction to be made inter partes, it must be established that the dissipation of assets are pre-emptive acts intended to prejudice any judgment in favour of the plaintiff.*

CIVIL PROCEDURE: *Injunction – Mareva injunction – Application to set aside – Requirements under O. 29 r. 1(2) and O. 29 r. 1(2A) of Rules of Court 2012 – Whether urgency of application established – Whether notice of application contained facts relied on to justify application ex parte – Whether answer likely given by opposite party stated – Whether requirements satisfied – Whether application allowed*

CIVIL PROCEDURE: *Injunction – Ex parte injunction – Application for ex parte Mareva injunction to be heard inter partes – Whether requirements to allow application established – Whether there was good arguable case – Whether parties had assets within country – Whether there were real risk assets would be dissipated – Whether balance of convenience criterion applicable to Mareva injunction*

The plaintiff obtained an *ex parte Mareva* injunction against the defendants and the defendants were each prohibited from disposing or dealing with their assets up to approximately RM1 million, the amount of the plaintiff's claim against them. The applications herein were to set aside the *Mareva* injunction, respectively, in: (i) encl. 32 by the first defendant's ('Teo') and; (ii) encl. 30, by the seventh defendant ('Leader Food') and the eighth defendant ('Taha Food'). The plaintiff's application in encl. 5 was for the *Mareva* injunction to be made *inter partes*.

Held (dismissing applications):

(1) The plaintiff had not sufficiently and purposefully satisfied O. 29 r. 1(2) and O. 29 r. 1(2A) of the Rules of Court 2012. Instead, the plaintiff merely regurgitated the words and phrases used in the orders to describe the requirements, without adequately particularising them. The plaintiff (i) merely stated that their *Mareva* application was urgent and did not demonstrate the urgency; (ii) did not give a clear and satisfactory

statement of fact relied on to justify an *ex parte* hearing of the *Mareva* application; (iii) did not give notice of the *ex parte Mareva* application and did not give good reasons for not giving notice; (iv) did not give a specific statement about the answers that Teo, Leader Food and Taha Food would assert or would likely to assert to oppose the *Mareva* application; and (v) did not give a clear and assessable statement about the facts that may lead the court not to grant the *ex parte Mareva* injunction or not to grant the injunction at all. As the plaintiff did not comply with the requirements of O. 29 r. 1(2) and O. 29 r. 1(2A)(c), (d) and (e), the application by Leader's Food and Taha Food to set aside the *ex parte Mareva* injunction was allowed. (paras 20, 24, 56-61 & 67)

(2) The parties agreed on the terms of consent order on encl. 32 and the order was accordingly recorded and was held not to be appealable. (paras 68 & 71)

(3) In order for the *Mareva* injunction to be heard *inter partes*, the plaintiff must demonstrate (i) a good arguable case; (ii) that Teo, Leader Food and Taha Food had assets in Malaysia; and (iii) there was a real risk that Teo, Leader Food and Taha Food would dissipate their assets to negate a judgment in the plaintiff's favour. Based on the pleadings, the plaintiff had a good arguable case. Further, Teo, Leader Food and Taha Food had assets within the jurisdiction. However, the plaintiff had not demonstrated that there was a real risk that Leader Food and Taha Food were likely to dissipate their assets, intended to specifically frustrate a possible judgment in the plaintiff's favour. (paras 74, 75, 77, 78 & 95)

(4) There is a distinction between *Mareva* injunctions and other 'non-*Mareva*' injunctions pending trial. *Mareva* and *Mareva*-type injunctions are of 'a different character'. A *Mareva* injunction 'bears no dependence on the final relief' of the cause. Instead, its purpose is 'to prevent an abuse of the legal process' where a party who is facing judgment intentionally dissipates the assets in question to avoid having to satisfy the judgment. The balance of convenience criterion and other related factors such as 'the adequacy of damages' or the irreparability of the damage that may be caused if the interlocutory injunction was not granted – are not factors that need to be considered in a *Mareva* injunction. The plaintiff's *inter partes* application for a *Mareva* injunction against Teo, Leader Food and Taha Food was dismissed. (paras 102 & 104)

Case(s) referred to:

American Cyanamid Co v. Ethicon Ltd [1975] AC 396 ***(refd)***

Creative Furnishing Sdn Bhd v. Wong Koi [1989] 2 CLJ 93; [1989] 1 CLJ (Rep) 22 SC ***(refd)***

Keet Gerald Francis Noel John v. Mohd Noor Abdullah & Ors [1995] 1 CLJ 293 CA ***(refd)***

Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd [2003] 4 CLJ 1 FC ***(refd)***

Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd [2004] 1 CLJ 239 CA ***(refd)***
Lee Kai Wuen & Anor v. Lee Yee Wuen [2022] 7 CLJ 505 CA ***(foll)***
Menk Sdn Bhd v. Joerg Hugo Schmidt [2009] 4 CLJ 795 CA ***(refd)***
Ninemia Maritime Corporation v. Trave Schiffahrtsgesellschaft mbH & Co KG; The Nidersachsen [1984] 1 All ER 398 ***(refd)***
S & F International Ltd v. Trans-Con Engineering Sdn Bhd [1985] 2 CLJ 228; [1985] CLJ (Rep) 280 FC ***(refd)***
Toyota Tsusho (Malaysia) Sdn Bhd v. Lau Kum Foon & Ors [2019] 4 CLJ 110 HC ***(refd)***
University of Malaya Medical Centre v. Choo Chee Kon & Anor [2008] 5 CLJ 295 HC ***(refd)***
Zainal Abidin Hj Abdul Rahman v. Century Hotel Sdn Bhd [1982] 1 LNS 34 FC ***(foll)***

Legislation referred to:
Rules of Court 2012, O. 29 r. 1(2), (2A)(c), (d), (e), O. 45 r. 7

For the plaintiff - Elizabeth Lau, Hazel Siau & Jessica Chew; M/s Elizabeth Lau
For the 1st & 6th defendants - Nicholas Tan, Phoebe Ooi & Lee Fei Wen; M/s Lim Huck Aik & Co
For the 2nd, 3rd, 4th, 5th, 7th & 8th defendants - B Jeyasingam & Lee Jun Leong; M/s Ghazi & Lim

Reported by S Barathi

JUDGMENT

(Application To Set Aside *Ex Parte Mareva* Injunction And *Inter Partes* Hearing)

Kenneth St James JC:

Prelusion

[1] The plaintiff obtained an *ex parte Mareva* injunction against a few of the defendants. The *Mareva* injunction was enforced. The affected defendants were each prohibited from disposing or dealing with their own assets up to approximately RM1m, which is the amount of the plaintiff's claim against each of them. Those affected defendants applied to set aside the *ex parte Mareva* injunction. Should the *ex parte Mareva* injunction be set aside?

[2] Also, the plaintiff's *ex parte* application for the *Mareva* injunction – Enclosure 5 – was made *inter partes*, so that those defendants could be heard in an *inter partes* hearing. Should the *Mareva* injunction be granted *inter partes*?

The Parties

[3] The plaintiff sues the first defendant (Teo) for breaches of statutory duty and fiduciary duty, and for conspiracy to injure. The plaintiff sues the other defendants for dishonest assistance and for conspiracy to injure.

[4] The affected defendants in these proceedings are the seventh defendant: Leader Food Sdn. Bhd. (Leader Food) and the eighth defendant: Taha Food Sdn. Bhd. (Taha Food).

A **[5]** I use these abbreviations here, for the ease of reference, because these were the abbreviations that were used by the parties in their pleadings, affidavits and written submissions.

The Applications/Enclosures For Disposal

B **[6]** Leader Food's and Taha Food's joint application to set aside the *Mareva* injunction is encl. 30. Teo's application to set aside the *Mareva* injunction is encl. 32. The plaintiff's application for the *Mareva* injunction, made *inter partes*, is encl. 5.

[7] These three enclosures were decided one after the other. Leader Food C and Taha Food's encl. 30 was heard first. A decision was made on encl. 30. Then, Teo's encl. 32 was dealt with, and an order was made on it. More on encl. 32 later. Then the plaintiff's *inter partes* encl. 5 was heard, and an order was made.

[8] I am writing one judgment to encompass all three enclosures.

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The Terms Of The *Mareva* Injunction

[9] In brief, the *Mareva* injunction prohibits Teo, Leader Food and Taha Food from disposing, dealing with or diminishing the value of any of their assets, including monies, up to the value of RM1,116,617.64.

E **[10]** There are other terms providing for the disclosure of information and the discovery of documents about Teo's, Leader Food's and Taha Food's assets, but those terms are not pertinent to this judgment.

[11] And as usual, the penal notice under O. 45 r. 7 of the Rules Of Court F 2012 (ROC) is endorsed on the *Mareva* injunction to forewarn Teo, Leader Food, Taha Food and their directors.

The Elements For An *Ex Parte Mareva* Injunction

[12] First, I set out the principles to follow when considering to grant a *Mareva* injunction. The authorities on *Mareva* injunctions establish that the G plaintiff must fulfil three elements. The plaintiff must demonstrate that:

(i) the plaintiff has "a good arguable case" against the defendants;

(ii) Teo, Leader Food and Taha Food have assets in Malaysia; and

H (iii) there is "a real risk of dissipation or secretion of assets so as to render any judgment which the plaintiff may obtain nugatory":

S & F International Ltd v. Trans-Con Engineering Sdn Bhd [1985] 2 CLJ 228; [1985] CLJ (Rep) 280; [1985] 1 MLJ 62 (FC); *Creative Furnishing Sdn Bhd v. Wong Koi* [1989] 2 CLJ 93; [1989] 1 CLJ (Rep) 22; [1989] I 2 MLJ 153 (SC).

[13] In *Creative Furnishing* (*supra*) at p. 25 (CLJ); pp. 154 to 155 (MLJ), the Supreme Court, through His Lordship Mohamed Azmi SCJ, set out the elements for a *Mareva* injunction, but also gave a caveat against readily granting such injunctions:

> In *Aspatra Sdn Bhd & 21 Ors v. Bank Bumiputra Malaysia Bhd & Anor* [1988] 1 MLJ 97 at p. 100, this court by a majority had referred to the importance of the relief by way of a *Mareva* injunction for the purpose of preserving assets and preventing a defendant from dissipating his assets within jurisdiction before judgment. But the remedy is **not of unlimited application.** On the facts of the appeal before us, the respondent must satisfy the court **firstly,** that he had **a good arguable case;** secondly, that the appellant had **assets within jurisdiction,** and thirdly, that there was **a real risk of the assets being dissipated or removed before judgment** in that **there must be solid evidence to establish the risk.** In our opinion, mere refusal to pay a disputed debt and issuing of a dishonoured personal cheque by a director of the second defendant (who was not a party in this appeal), as presented before the learned judge, fell far too short of the necessary evidence to establish real risk of dissipation of assets of the appellant before judgment. (emphasis added)

[14] Applying for a *Mareva* injunction is an onerous endeavour. Applying for a *Mareva* injunction *ex parte*, without the presence of the opposite party, is an even more onerous task.

[15] To uphold the rules of natural justice, the ROC and our procedural law, place – in fact, mandate – certain obligations on the plaintiff to strictly adhere to, so that the plaintiff is eligible to be considered to be given an *ex parte Mareva* injunction.

[16] There are certain requirements or prerequisites that the plaintiff must comply with, to be granted an *ex parte* injunction. The requirements are prescribed in O. 29 r. 1 of the ROC.

[17] The relevant portions of O. 29 r. 1 read as follows:

> **Order 29. Interlocutory injunctions, interim preservation of property**
>
> **Application for injunction (O. 29, r. 1)**
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> 1. (1) An application for the grant of an injunction may be made by any party to a cause or matter before or after the trial of the cause or matter, whether or not a claim for the injunction was included in that party's originating process, counterclaim or third party notice, as the case may be.
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> (2) Such application may be made by a notice of application supported by an affidavit and where the case is one of urgency, may be made *ex parte*.
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> (2A) The affidavit in support of an application made *ex parte* must contain a clear and concise statement of:

A (a) the facts giving rise to the claim;

(b) the facts giving rise to the application for interim injunction;

(c) the **facts relied on to justify** the application *ex parte*, including details of any notice given to the other party or, **if notice has not been given, the reason for not giving notice;**

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(d) **any answer by the other party (or which he is likely to assert) to the** claim or **application;**

(e) **any facts which may lead the Court not to grant** the application *ex parte* or **at all**; … (emphasis added)

C **[18]** To be heard *ex parte* and to be given this *ex parte Mareva* injunction, there are at least five requirements that the plaintiff must satisfy in their application. The requirements that the plaintiff must necessarily demonstrate to make their application *ex parte* and be heard *ex parte* – that is, without Teo's, Leader Food's and Taha Food's presence – are that:

D (i) their application is urgent;

(ii) they must state the facts that they rely on to justify their application *ex parte*; in other words, the reasons that they need to be heard *ex parte*;

(iii) as they did not give notice to Teo, Leader Food and Taha Food – they E must state the reasons that they did not give notice;

(iv) they must state any answer by Teo, Leader Food and Taha Food, or the answer that Teo, Leader Food and Taha Food is likely to assert; and

(v) they must state any facts which may lead the court not to grant the F application *ex parte*.

Non-Compliance With The Strict Requirements Of O. 29 r. 1(2) And O. 29 r. 1(2A) For *Ex Parte* Injunctions

[19] When the plaintiff endeavours to satisfy these requirements, it is almost as if the plaintiff is obligated to speak for Teo, Leader Food and Taha G Food; to speak in their favour; and to let the court know what the plaintiff expects them to say.

[20] I find that the plaintiff has not sufficiently and purposefully satisfied these O. 29 r. 1(2) and O. 29 r. 1(2A) requirements. Instead, I find that in their affidavit in support (encl. 6), the plaintiff merely regurgitated the words H and phrases used in O. 29 r. 1(2) and O. 29 r. 1(2A) to describe the requirements, without adequately particularising them.

[21] The plaintiff's averments include:

I (i) Teo, as one of the plaintiff's directors, owed statutory and fiduciary duties to the plaintiff;

(ii) Teo also owed a duty of confidence to the plaintiff;

(iii) Teo breached these duties by setting up the businesses of Leader Food and Taha Food, through the other defendants, to compete with the plaintiff; A

(iv) Teo diverted the plaintiff's suppliers and customers to Leader Food and Taha Food;

(v) Leader Food, Taha Food and the other defendants rendered dishonest assistance to Teo; B

(vi) all the defendants conspired to injure the plaintiff;

(vii) the loss and damage to the plaintiff was quantified at RM1,116,617.64 – the *Mareva* amount. C

[22] These averments may well substantiate the plaintiff's causes of action, and support the plaintiff's claim against Teo, Leader Food and Taha Food. But what about the plaintiff's averments to satisfy O. 29 r. 1(2) and O. 29 r. 1(2A). D

[23] The plaintiff purported to make the averments to satisfy O. 29 r. 1(2) and O. 29 r. 1(2A) in Part L of their affidavit in support, particularly through paras. 101 to 104.

[24] First, in para. 101 of their affidavit in support, the plaintiff averred: "The facts giving rise to the claims made against Teo, Leader Food and Taha Food have been adequately set out above. The facts have also been set out in the statement of claim". But these are averments of fact that relate only to the plaintiff's causes of action and the claim against the defendants. They are not averments of fact that satisfy the requirements of O. 29 r. 1(2). E F

[25] The first omission is under O. 29 r. 1(2) – that the application is urgent. The plaintiff omitted to demonstrate why their application must be heard urgently. They did not demonstrate the urgency of their application. For example, they did not show that it is likely, or expected, that Teo, or Leader Food, or Taha Food will soon dissipate their assets out of Malaysia, beyond the reach of the plaintiff. G

[26] Second, in para. 102 of their affidavit in support, the plaintiff averred that "the facts relied on to justify" the *ex parte Mareva* application "have also been adequately set out above". But what was "set out above" in the earlier parts of their affidavit in support was, as I mentioned, merely about their causes of action and their claim against the defendants. These averments do not satisfy the requirements of O. 29 r. 1(2A). H

[27] The second omission is under O. 29 r. 1(2A)(c) – the facts relied on to justify an *ex parte* application. The plaintiff submits that they are entitled to an *ex parte Mareva* injunction, by generally asserting that Teo has breached statutory, fiduciary and confidence duties, and conspired with Leader Food and Taha Food. I find these general assertions insufficient for the purpose of satisfying the requirements of O. 29 r. 1(2A)(c). I

[28] It is akin to the plaintiff submitting that the facts that they rely on to justify having their *Mareva* application heard *ex parte*, are the very facts that they have already stated in their statement of claim. But those facts do not demonstrate to me the reasons that they should be heard *ex parte*.

[29] Third, in para. 102 again, the plaintiff averred: "No notice has been given to Teo, Leader Food and Taha Food" for the *Mareva* application for these reasons:

(i) "the facts averred herein (in the earlier parts of the affidavit in support, about Teo's breaches of duty and about the conspiracy among the defendants) sufficiently explain the necessity in moving the court on an urgent *ex parte* basis";

(ii) the "nature" of the *Mareva* application "essentially dictate as such";

(iii) "secrecy is an essential element given the dishonest conduct by Teo".

[30] The third omission is also under O. 29 r. 1(2A)(c) – if no notice is given, the plaintiff must state the reason for not giving notice. I find no meaningful explanation in the plaintiff's statement above, as to why they did not give notice to Teo, Leader Food and Taha Food.

[31] I understand the plaintiff's statement to mean that the plaintiff did not give notice of their application to Teo, Leader Food and Taha Food because the plaintiff's causes of action for breaches of statutory, fiduciary and confidence duties, and for conspiracy against the defendants, make it necessary for the *Mareva* application to be heard *ex parte* and urgently. But I find that this is not necessarily so. It does not follow.

[32] If an averment such as this is sufficient to justify not giving notice to the opposite side – against whom an *ex parte Mareva* injunction is sought – then it would be unfairly easy for any plaintiff to apply for and obtain an *ex parte Mareva* injunction. All that a plaintiff has to do to satisfy the O. 29 r. 1(2A)(c) requirement, is to state that the material facts pleaded in the statement of claim about the defendant's alleged wrongdoing, inherently justify not giving notice to the defendant. It will tend to make O. 29 r. 1(2A)(c) redundant and ineffectual.

[33] The other reason that the plaintiff suggests for not giving notice to Teo, Leader Food and Taha Food is that the "nature" of *Mareva* injunctions "dictate" that the application be kept a secret. I also find this averment not necessarily so.

[34] It seems to me that what the plaintiff is saying is that they want to keep the *Mareva* application a secret. If Teo, Leader Food and Taha Food know about it, this knowledge will cause them to dissipate their assets. The secretive nature of a *Mareva* application is the very reason that they do not want to give notice to Teo, Leader Food and Taha Food.

[35] In other words – the plaintiff says that the *Mareva* application should be kept secret; the plaintiff does not want to give notice; the reason that the plaintiff does not want to give notice is that it should be kept secret. This, to me, is a circular argument.

[36] It is my finding, even though I am mindful of the often-requested need for secrecy for a *Mareva* application, that there is, first and foremost, a duty to give notice to the opposite side, because the opposite side will not be heard on the merits. If the applicant plaintiff does not want to give notice, the applicant has to justify the reason for not giving notice. It is not enough to say that the "nature" of a *Mareva* application is that it needs to be made in secret.

[37] Put differently, the applicant should not be allowed to by-pass this obligation to give notice of an injunction application, just by submitting that *Mareva* applications need to be made with secrecy.

[38] Fourth, in para. 103 of their affidavit in support, the plaintiff attempts to state the answer that Teo, Leader Food and Taha Food are likely to give, in opposing the *Mareva* application. But all that the plaintiff states here is that "it is conceivable" that Teo, Leader Food and Taha Food will "deny any breaches of duty", and "deny that there was any conspiracy", and "deny dishonest assistance".

[39] The fourth omission is under O. 29 r. 1(2A)(d) – the answers that Teo, Leader Food and Taha Food will likely give, to oppose the application. I am of the view that this O. 29 r. 1(2A)(d) requirement – disclosing the answers in opposition against the grant of a *Mareva* injunction – serves a specific purpose.

[40] Since the plaintiff was moving the court to grant an *ex parte Mareva* injunction, the plaintiff must inform the court what the plaintiff themselves expect Teo, Leader Food and Taha Food to say to oppose the *Mareva*. It is entirely unhelpful if the court is simply informed that the plaintiff expects Teo, Leader Food and Taha Food to oppose the *Mareva* application. It is a given that Teo, Leader Food and Taha Food will oppose the grant of a *Mareva* injunction. A *Mareva* injunction may significantly hinder Teo's use of his own assets, and may significantly hinder, if not cripple, Leader Food's and Taha Food's business operations.

[41] Order 29 r. 1(2A)(d) dictates that the plaintiff must reduce to particulars and inform the court the why and the what – Why would Teo, Leader Food and Taha Food oppose an *ex parte Mareva* application? What may their reasons be?

[42] And only when the court knows the two competing merits, can the court consider and fairly decide whether to grant an *ex parte Mareva* injunction – as if Teo, Leader Food and Taha Food had spoken up to voice their opposition to the application.

A **[43]** Order 29 r. 1(2A)(d) requires that the plaintiff states what Teo, Leader Food and Taha Food will or are likely to say to oppose the *Mareva* application. This, to me, the plaintiff did not fulfil.

[44] I find that among the facts or matters that Teo is expected to assert, or is likely to assert, in answer to the plaintiff's claim or in answer to the B *Mareva* application, which are relevant for the court to consider – and note that these facts and matters are known to the plaintiff – include:

(i) The other director-*cum*-shareholders of the plaintiff: Pamella Chiang and Yurisa Chiang, together hold 60% of the shares in the plaintiff. They have majority control of the plaintiff. Teo asserts that he has to get their C consent before he can buy stocks for the plaintiff from their suppliers. Teo asserts that he "operates in a limited scope and capacity". Teo asserts that he is only authorised to sign for transactions that amount to RM10,000 or below. And Teo asserts that he is not authorised to sign for transactions in US Dollars.

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(ii) Teo asserts that the plaintiff transacts with two Singapore-incorporated companies that are in direct competition with the plaintiff. These companies are Kwee Gee Pte. Ltd. and Provident Endeavours Pte. Ltd. Pamella Chiang is a director and shareholder, and Yurisa Chiang is a E shareholder, of Kwee Gee Pte. Ltd. Pamella Chiang and Yurisa Chiang are directors of Provident Endeavours Pte. Ltd. Teo asserts that Pamella Chiang and Yurisa Chiang used the plaintiff to sell goods to these companies "at very favourable pricing and at cost". Teo asserts that these two companies were "reaping profits at the plaintiff's expense", to benefit the companies' shareholders.

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[45] But the plaintiff did not disclose these facts in their *Mareva* application.

[46] Fifth, in para. 104 of their affidavit in support, the plaintiff states that they are "unaware of any matters and/or facts which might lead this Honourable Court to refuse the *Mareva* application", "on an *ex parte* basis".

G **[47]** The fifth omission is under O. 29 r. 1(2A)(e) – the plaintiff must state any facts that may lead the court not to grant the application *ex parte*, or not to grant the application at all. The plaintiff appears to just cursorily say that they were unaware of such facts. Again, the plaintiff merely recites the statements, in an attempt to superficially satisfy this requirement.

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[48] So, to my mind, the plaintiff has not satisfied the requirements of O. 29 r. 1(2) and O. 29 r. 1(2A)(c), (d) and (e).

The Law On The Extent Of The Statements That The Plaintiff Must Make Under O. 29 r. 1(2A)

I **[49]** First, I reiterate that to obtain an *ex parte* injunction, strict compliance with O. 29 r. 1 is a must. If there is non-compliance, the *ex parte* injunction should be set aside.

[50] Also, mere "lip-service" to the requirements of O. 29 r. 1(2A) for an *ex parte* injunction application, is not satisfactory: *University Of Malaya Medical Centre v. Choo Chee Kon & Anor* [2008] 5 CLJ 295; [2008] 3 MLJ 278 (HC). A

[51] In *University Of Malaya Medical Centre* (*supra*), His Lordship Hishamudin Mohd Yunus J (as he was then) had this to say about the compliance with the requirements of O. 29 r. 1(2A) of the previous Rules Of The High Court 1980: B

> [21] In the present case, in seeking to set aside the *ex parte* injunction order of 21 October 2004, **the defendants contend,** among others, that the plaintiff had **failed to give notice** of the *ex parte* application to the defendants when the plaintiff applied for the *ex parte* injunction order; **or,** alternatively **to explain satisfactorily as to why such a notice was not given** to them. The giving of notice of the *ex parte* application (or the furnishing of an explanation in the *ex parte* application where such notice was not given) is **required by O. 29 r. 1(2A)(c) of the RHC.** C D
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> [22] In my judgment, **there is a merit in the defendants' contention** that the plaintiff's **failure to give notice was not justified** …
>
> [24] Hence, on 20 October 2004 the plaintiff and their solicitors were making the necessary preparation for the filing of the *ex parte* application and they expected to file the *ex parte* application the following day, 21 October 2004 … This being the scenario, **the plaintiff could have – and should have – notified** the defendants on the 20 October itself of its intention to file … so that the defendants could have alerted their solicitors; and so that the defendants' counsel could appear before the court at the hearing of the *ex parte* application and to apply **to be given the opportunity to be heard on an *ex parte* opposed basis.** But the plaintiff's… solicitors chose not to inform the defendants of the *ex parte* application. **Even** in the morning of 21 October **when the solicitors for the plaintiff was set to file the *ex parte* application, the defendants were still not informed** – although the plaintiff had ample opportunity to do so, if the plaintiff had taken the matter of giving notice seriously; which as a matter of law the plaintiff should … . E F G
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> [26] In my judgment, there was **no satisfactory explanation** whatsoever proffered to the court **as to why the defendants were not given notice** on 20 October 2004 (or at the very least on the morning of 21 October) …
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> [27] This is **too vague an explanation** and **too lame an excuse.** The legal **burden is on the plaintiff** to **satisfy the court** as to **why it failed to give notice** to the defendants. In my opinion, in the present case, the duty to give notice arises on 20 October itself when the plaintiff made the decision to file the *ex parte* application on 21 October. In my judgment, upon examining the explanation furnished … I find that the plaintiff has failed to furnish a satisfactory explanation as to why notice of the *ex parte* application was not given to the defendants. The plaintiff alleges that there was **'time constraint'**. Why was there 'time constraint' (kesuntukan H I

masa)? **The plaintiff must give the court a clear explanation, – not a general or a vague explanation.** My finding is that clearly there is no satisfactory explanation given by the plaintiff. In arriving at my finding … I also take into account of the following facts. The defendants were not elusive parties; nor were they strangers to the plaintiff … it is clear to me that **the plaintiff has taken the legal duty to inform the defendants of the *ex parte* application, or the legal duty to explain to the court for the omission in giving such notice, very lightly.** In my judgment, the averment…is nothing but a **mere lip service effort**.

[28] Thus, there is clear non-compliance of O. 29 r. 1(2A)(c) of the RHC. Order 29 r. 1(2) and (2A)(c) of the RHC stipulates:

> (2) Where the applicant is the plaintiff and the case is one of urgency such application may be made *ex parte* by summons supported by an affidavit but, except as aforesaid, such application must be made by summons.
>
> (2A) The affidavit in support **shall** contain a clear and concise statement:
>
> > (c) of the facts relied on as justifying application *ex part*e, including details of any notice given to the defendant or, **if none has been given, the reason for giving none;**

[29] According to the *Malaysian High Court Practice*, 2001 Desk Ed 1, at p. 1032, para. [29.1.17]:

> The requirements in r. 1(2A) are mandatory. Thus, **where a plaintiff fails to give notice** of an application made ***ex parte* out of fear that it will defeat the purpose of the proceedings,** the plaintiff **must state** in his supporting affidavit **the reasons why notice in advance was not given** to the defendant. As the introductory sentence in r. 1(2A) states that the affidavit 'shall contain a clear and concise statement', the statement **must be stated clearly and concisely and may not be implied:** *Delimec Hygiene Sdn Bhd v. EMIC (M) Sdn Bhd* [2001] 5 MLJ 186 at p. 197. **The consequence** of the plaintiffs **failure to comply** with r. 1(2A) is that **the injunction must be discharged. To do otherwise would defeat the policy** behind the introduction of r. 1(2A): *UMAS Sendirian Berhad v. RHB Bank Berhad & Anor* [2001] 1 AMR 1024.

[30] In my judgment, **compliance with r. 1(2A)(c) is mandatory.** If there had been non-compliance, it is a **very serious breach of the RHC** and **the *ex parte* order must be set aside.** This approach is **consistent with the policy behind the introduction of r. 1(2A).** I therefore, set aside the *ex parte* injunction order due to non-compliance of r. 1(2A)(c) of the RHC.
(emphasis added)

[52] Second, in my view, non-compliance with the requirements of O. 29 r. 1 is related to the principle that in an *ex parte* application, the applicant must make full and frank disclosure of all relevant and material facts (and evidence), both favourable and unfavourable to the applicant.

[53] In my view, the rationale for disclosing both favourable and unfavourable matters in an *ex parte* hearing is that in the subsequent *inter partes* hearing, when the unfavourable matters are eventually disclosed by the opposite side – it is likely that the *ex parte* order will indeed be set aside as a matter of course. This consequence would have brought about a waste of judicial time. It is also fundamentally to prevent an abuse of the process of the court.

[54] Now, if an applicant in an *ex parte* application does not comply with the strict requirements of O. 29 r. 1 – which means that the applicant does not comply with the duty to make full and frank disclosure – the *ex parte* injunction can be set aside, even if after eventual full disclosure, the court is of the view that the injunction should have been granted: *Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd* [2004] 1 CLJ 239; [2004] 1 MLJ 316; [2004] 1 AMR 417 (CA). (Note: This Court of Appeal *Kosma Palm Oil Mill* judgment – about the duty to make full and frank disclosure when making an *ex parte* injunction application, is a different judgment to the Federal Court *Kosma Palm Oil Mill* judgment [2003] 4 CLJ 1; [2004] 1 MLJ 257; [2003] 5 AMR 758 – which solidified the test of "special circumstances" for a stay of execution.

[55] The Court of Appeal in *Kosma Palm Oil Mill* (*supra*), through His Lordship Richard Malanjum JCA (as he was then), held:

> It is trite law that in any *ex parte application* it is *essential* that there *must be frank and fair disclosure of all relevant materials* including points that may be *unfavourable to an applicant.* In *Siporex Trade SA v. Comdel Commodities Ltd* [1986] 2 Lloyd's Law Rep 428, his Lordship Bingham J (as he then was) said this at p. 437:
>
> > Failure to make full and fair disclosure
> >
> > The scope of the duty of disclosure of a party applying *ex parte* for injunctive relief is, in broad terms, agreed between the parties. Such an applicant must show the *utmost good faith and disclose his case fully and fairly.* He must, for the protection and information of the defendant, summarise his case and the evidence in support of it by an affidavit or affidavits sworn before or immediately after the application. He *must identify* the *crucial points for and against the application,* and *not rely on general statements* and the mere exhibiting of numerous documents. He must investigate the nature of the cause of action asserted and the facts relied on before applying and *identify any likely defences.* He must *disclose all facts* which *reasonably could or would be taken into account by the judge* in deciding – whether to grant the application. It is *no excuse* for an applicant to say that he was *not aware of the importance* of matters he has omitted to state. *If the duty of full and fair disclosure is not observed, the court may discharge the injunction even if after full enquiry, the view is taken that the order made was just and convenient and would probably have been made even if there had been full disclosure*. Most of these principles are established by

A authorities such as *Rex v. The Kensington Income Tax Commissioners* [1917] 1 KB 486; *Thermax Ltd v. Schott Industrial Glass Ltd* (1981) FSR 289; *Wardle Fabrics Ltd v. G Myristis Ltd* (1984) FSR 263; *BankMellat v. Nikpour* (1985) FSR 87 … (emphasis added)

Enclosure 30: Leader Food And Taha Food's Application To Set Aside The B *Ex Parte Mareva* Injunction

[56] In the context of granting an *ex parte Mareva* injunction, the compliance or non-compliance with the requirements of O. 29 r. 1 and the requirement of full and frank disclosure – is significant and decisive.

C **[57]** I find that the plaintiff did not comply with the requirement of O. 29 r. 1(2) – the plaintiff merely stated that their *Mareva* application was urgent. But the plaintiff did not demonstrate the urgency. The plaintiff did not explain the reason that it must be heard urgently.

[58] I find that the plaintiff did not comply with the requirement of O. 29 D r. 1(2A)(c) – the plaintiff did not give a clear and satisfactory statement of the facts relied on to justify an *ex parte* hearing of the *Mareva* application.

[59] I find that the plaintiff did not comply with another requirement of O. 29 r. 1(2A)(c) – the plaintiff did not give notice of their *ex parte Mareva* application, and more importantly, did not give good reasons for not giving E notice. I reiterate that the plaintiff merely stated that the nature of a *Mareva* application is that it should be made in secret.

[60] I find that the plaintiff did not comply with the requirement of O. 29 r. 1(2A)(d) – the plaintiff did not give a specific statement about the answers that Teo, Leader Food and Taha Food would assert, or would likely assert, F to oppose the *Mareva* application.

[61] And I find that the plaintiff did not comply with the requirement of O. 29 r. 1(2A)(e) – the plaintiff did not give a clear and assessable statement about the facts that may lead the court not to grant the *ex parte Mareva* injunction, or not to grant the *Mareva* injunction at all.

G

[62] In my view, if, generally, plaintiffs can obtain a *Mareva* injunction, *ex parte*, and be deemed to have satisfied the O. 29 r. 1(2) and O. 29 r. 1(2A) requirements by simply stating, without particulars, what the plaintiff has stated here – that secrecy is essential for their application; that giving notice H to the defendants will in fact cause the defendants to dissipate their assets; that they expect the defendants to merely deny their claim; that they cannot think of any facts (even in a heavily contested dispute such as this matter) that might lead the court not to grant the *Mareva ex parte* or not to grant the *Mareva* at all – then it will be rather relatively easy for plaintiffs in civil suits to procure *Mareva* injunctions. I

[63] And such plaintiffs will, in effect, easily obtain the advantage of an "advance security" for the payment of a presumed ultimate judgment against the defendants, at the stage where the dispute proper is nowhere near to being determined yet.

[64] I am of the view that the procedural path to obtain *Mareva* or *Mareva*-type injunctions is not meant to cause this circumstance.

[65] I am also both guided and bound by the findings of the Federal Court in *Zainal Abidin Hj Abdul Rahman v. Century Hotel Sdn Bhd* [1982] 1 LNS 34; [1982] 1 MLJ 260 (FC). The Federal Court, through His Lordship Raja Azlan Shah CJ (Malaya) (as he was then), cautioned against a liberal exercise of the court's power to grant *Mareva* injunctions.

[66] His Royal Highness held (at [1982] 1 MLJ p. 262) that the power of the courts to grant *Mareva* injunctions:

> … must not be debased into something invoked to obtain **security for a judgment in advance,** or **pressuring a defendant into a settlement.**
>
> "The courts must be vigilant to ensure that **a *Mareva* defendant is not treated like a judgment debtor**" (see *A.J. Bekhor & Co. Ltd. v. Bilton* (*supra* – [1981] 2 All ER 577)). It is consequently not accurate to refer to a *Mareva* injunction as a pre-trial attachment (see *Cretanor Maritime Co Ltd v. Irish Maritime Management Ltd* [1978] 1 Lloyd's Rep 425).
>
> (emphasis added)

[67] And so, because the plaintiff did not comply with the requirements of O. 29 r. 1(2) and O. 29 r. 1(2A)(c), (d) and (e), I allow encl. 30 – Leader Food's and Taha Food's application to set aside the *ex parte Mareva* injunction – with RM25,000 costs to be paid by the plaintiff to Leader Food and Taha Food. Costs are subject to the allocator. I also order Leader Food's and Taha Food's damages to be assessed.

Enclosure 32: Teo's Application To Set Aside The Ex Parte Mareva Injunction

[68] At the hearing, after I rendered my summarised oral grounds and made an order on encl. 30 – setting aside the *ex parte Mareva* injunction against Leader Food and Taha Food – I asked to hear encl. 32. But counsel for the plaintiff informed me that the plaintiff and Teo, through their respective counsel, had agreed on the terms of a consent order on encl. 32. The consent order was for encl. 32 to be allowed as well, but with the plaintiff paying to Teo costs of RM10,000.

[69] I took it that the plaintiff and Teo came to that agreement because of my decision to set aside the *ex parte Mareva* injunction as against Leader Food and Taha Food, and the grounds that I gave for doing so. And I was given the impression that because there was an agreement to record a consent order, the agreed costs between the plaintiff and Teo was only RM10,000 – which was much less than the RM25,000 between the plaintiff, and Leader Food and Taha Food.

[70] There were no oral arguments on encl. 32. Parties asked for the agreed terms to be recorded.

[71] I am of the view that the order recorded on encl. 32 is a consent order and should not be appealable.

[72] Nevertheless, if the order that I recorded or made on encl. 32 is appealable, and the plaintiff's appeal against the order is competent, and I am to give my grounds for allowing encl. 32 – setting aside the *ex parte Mareva* injunction against Teo – my grounds would be the same grounds as the grounds for allowing encl. 30.

[73] Enclosure 32 – Teo's application to set aside the *ex parte Mareva* injunction – is allowed with RM10,000 costs to be paid by the plaintiff to Teo. Costs are subject to the allocator. I also order Teo's damages to be assessed.

Enclosure 5: Plaintiff's *Inter Partes* Application For A *Mareva* Injunction

[74] As the *ex parte Mareva* injunction was set aside, the plaintiff wanted encl. 5 – the plaintiff's application for a *Mareva* injunction – to be heard *inter partes*, and for an order to be made on it.

[75] So, I now consider if the plaintiff has adequately demonstrated the three elements necessary to be granted a *Mareva* injunction.

Does The Plaintiff Have A Good Arguable Case?

[76] The first element that the plaintiff must demonstrate is that they have "a good arguable case" against the defendants. What "a good arguable case" means is that the plaintiff's case is "more than being barely capable of serious argument, but not necessarily one that the judge believes has got more than fifty present chance of success": *S & F International Ltd* (*supra*), at p. 283 (CLJ); p. 64 (MLJ):

> Mustill, J, held in *Ninemia Maritime Corporation v. Trave Schiffahrtsgesellschaft mbH & Co KG KG* [1984] 1 All ER at p. 413 [1984] 1 All ER [1983]] 1 WLR 1412 398 on appeal to CA that: (1) Before a *Mareva* injunction will be granted, a plaintiff must show first that he has **a good arguable case,** which is **more than being barely capable of serious argument, but not necessarily** one that the judge believes has got **more than fifty per cent chance of success;** … (emphasis added)

[77] Looking at the pleadings – the plaintiff's statement of claim, Teo's defence and counterclaim, Leader Food's defence and Taha Food's defence – I find that the plaintiff has a good arguable case.

Do Teo, Leader Food And Taha Food Have Assets In Malaysia?

[78] This element is not disputed. Teo, Leader Food and Taha Food have assets within the jurisdiction.

Is There A Real Risk That Teo, Leader Food And Taha Food Will Dissipate Their Assets To Negate A Judgment In The Plaintiff's Favour?

Applicable Principles

[79] I will first set out some of the governing principles that I have to apply, to decide on the issue of the real risk of Teo, Leader Food and Taha Food dissipating their assets.

[80] A *Mareva* injunction is an order to freeze Teo's, Leader Food's and Taha Food's assets, to prevent them from dissipating their respective assets, so that they do not frustrate an ultimate judgment that may be entered against them.

[81] I am not concerned with, say, assets that were conveyed over by the plaintiff to Teo, Leader Food or Taha Food, or monies that were paid over by the plaintiff to Teo, Leader Food or Taha Food, or assets or monies that the plaintiff alleges are held on trust or held beneficially for the plaintiff. I am here concerned only with Teo's personal assets and Leader Food's and Taha Food's company assets.

[82] First – the plaintiff must demonstrate this real risk of dissipation, not merely by asserting it. In other words, not just by saying so. The plaintiff must instead demonstrate this real risk, not merely by arguing that the risk is there. The plaintiff must demonstrate this real risk of dissipation by a preponderance of evidence – evidence that it is likely that Teo, Leader Food or Taha Food will dissipate their assets, for the sole premeditated purpose of frustrating the plaintiff's judgment.

[83] The Federal Court in *S & F International* (*supra*) at p. 283 (CLJ); p. 64 (MLJ), through His Lordship Abdoolcader FJ, citing with approval the UK case of *Ninemia Maritime Corporation v. Trave Schiffahrtsgesellschaft mbH & Co KG; The Nidersachsen* [1984] 1 All ER 398, held:

> … (2) Before such relief is granted the plaintiff must secondly show that there is a risk that assets will be dissipated: he must demonstrate this by *solid evidence*, *eg*, that *the defendant's previous actions show his probity is not to be relied upon or that the corporate structure of the defendant infers that it is not to be relied upon* … (3) In reaching its conclusion, the court should take into account the defendant's *evidence* as well as the plaintiff's. The English Court of Appeal in dismissing an appeal by the plaintiffs in that case ([1983] 1 WLR 1412; [1984] 1 All ER at p. 413) restated the principles of *Mareva* applications and held that the jurisdiction to grant *Mareva* injunctions was exercisable in cases where it appeared just and convenient to the court to grant the injunction, and the plaintiff had, *inter alia*, to show, on the *evidence* as a whole, that there was at least a good arguable case that he would succeed at the trial, and *that a refusal of an injunction would involve a real risk that a judgment* or award *in his favour would remain unsatisfied because of the defendant's removal of assets* from the jurisdiction or dissipation of assets within the jurisdiction. (emphasis added)

[84] I am guided by, and agree with, Her Ladyship Noorin Badaruddin J in *Toyota Tsusho (Malaysia) Sdn Bhd v. Lau Kum Foon & Ors* [2019] 4 CLJ 110; [2019] 10 MLJ 596 (HC), where she reasoned that when there is no evidence, or insufficient evidence, to show that there were attempts by the opposite party to dissipate their own assets, a *Mareva* injunction should not be ordered against the opposite party.

[85] Her Ladyship held:

> [36] … examples of conduct that justify a finding that there is a risk of dissipation of assets are illustrated from cases highlighted by the plaintiff such as:
>
> (a) *Petowa Jaya Sdn Bhd v. Binaan Nasional Sdn Bhd* [1988] 2 MLJ 261 where there is '**solid evidence** that the probity of the defendant could not be relied on';
>
> (b) *Amixco Asia Pte Ltd v. Bank Negara Indonesia 1946* [1992] 1 SLR 703 where the Singapore Court of Appeal found that there is **'*prima facie* dishonest conduct'**;
>
> (c) *Honsaico Trading Ltd v. Hong Yiah Seng Co Ltd* [1990] HKCU 429; [1990] HKCA 297 where the Hong Kong Court of Appeal stated when there is **'an unacceptable low standard of commercial morality'**; and
>
> (d) *Zarina bt Sharil & Anor v. Chiong Chuan Hwa & Ors* [2009] 2 MLJ 124 where the High Court stated that the 'illegal conduct' of the defendants **'imputes dishonesty giving rise to a real danger of dissipation'**.
>
> [37] In contrast with the present case … the plaintiff has failed to show any **evidence** that the defendants had acted dishonestly or lacked of probity which could give rise to a risk that their assets will be dissipated. **No evidence is** proffered to show that … **there were attempts of dissipation of assets by the defendants** … (emphasis added)

[86] Second – beyond demonstrating that there is a real risk of asset dissipation, the plaintiff must demonstrate to the court that the premeditated dissipation is done intentionally to avoid a possible judgment: *Menk Sdn Bhd v. Joerg Hugo Schmidt* [2009] 4 CLJ 795; [2009] 3 MLJ 205; [2010] 3 AMR 488 (CA).

[87] In *Menk* (*supra*), the Court of Appeal, through His Lordship Suriyadi Halim Omar JCA (as he was then), held:

> [31] … It is trite law that in order to succeed in a *Mareva* injunction application, **dissipation of assets *per se* is incomplete unless the applicant also successfully establishes the fact that the dissipation are preemptive acts that would lead to an intentional stultifying of any judgment** that may be obtained. The two ingredients must go hand in hand. (emphasis added)

[88] Third – the real risk of dissipation cannot be presumed from the plaintiff's mere allegation that Teo, Leader Food and Taha Food have committed wrongful acts against the plaintiff. I should not presume that there is a real risk of dissipation purely from the plaintiff's assertions that Teo, Leader Food and Taha Food are dishonest. There must be direct evidence to support the assertions. There must be evidence that has a "real and material bearing" on the risk of dissipation. There must be evidence that can justify an inference of a real risk of dissipation.

[89] I refer to, and am bound by, the lucid exposition of the authorities on this issue by the Court of Appeal in the recent case of *Lee Kai Wuen & Anor v. Lee Yee Wuen* [2022] 1 LNS 1057; [2022] 5 AMR 109 (CA), through His Lordship Darryl Goon Siew Chye JCA, where, after a methodical analysis of the authorities, he propounded as follows:

> [94] *The need for evidence of a real risk of dissipation of assets* was also *central* to the decision of the Federal Court in *Zainal Abidin bin Haji Abdul Rahman v. Century Hotel Sdn Bhd* [1982] 1 MLJ 260, where his Royal Highness, Raja Azlan Shah CJ (Malaya) stated in respect of a *Mareva* injunction at p. 264:
>
> > The appellant still has to establish the second requirement, that is in order to gain the particular form of protection sought by the injunction *he must show that there is a danger that the company's available assets will be dissipated* to prejudice the appellant's claim. *That is a matter of evidence.*
>
> [98] To hold that a real risk of dissipation of assets may be *presumed* is *effectively to negate the need to actually establish that such a risk exists.* This, in our view, would be inconsistent with all the settled authorities that a real risk of dissipation is an essential ingredient. This requirement *necessarily means* it is an issue that *has to be established* and in legal proceedings, that can only be achieved *by means of evidence.* The binding authorities of our courts do not in fact establish that there exists any exception to the rule, such that this ingredient may be presumed in any identified circumstance.
>
> [99] *What the authorities do establish,* and none so clearly as in the decision in *Ninemia Maritime Corporation* which was expressly quoted by the Federal Court in S & F International Limited, and thus a decision binding on this Court, *is that there must be evidence of a real risk of dissipation of assets – whether direct evidence or an inference that may properly be drawn from evidence that is led and provided. It may not be presumed,* particularly at an interlocutory stage, *when allegations made of impropriety have yet to be proved. If, however, want of probity or misconduct is so clearly established,* even at the interlocutory stage, *then, depending on the nature of the lack of probity or misconduct, a real risk of dissipation of assets may be inferred – not presumed.*
>
> [100] *As for allegations of misappropriation, dishonesty or lack of probity,* it is a matter of common sense that *even if there exists evidence of these allegations,* they *must also be of a nature that has a real and material bearing on,* or *of a nature that can justify an inference of, a real risk of dissipation* of assets (see *Bouvier,*

A *Yves Charles Edgar and another v. Accent Delight International Ltd and another and another appeal* [2015] SGCA 45; [2015] 5 SLR 558). *Mere allegations* of these nature, *even with some evidence in support of these allegations, would not per se warrant a presumption or inference that there exists a real risk of dissipation of assets.* (emphasis added)

B *Should A Mareva Injunction Be Ordered Against Leader Food And Taha Food?*

[90] The plaintiff asserts that Teo caused Leader Food and Taha Food to be incorporated, to divert business away from the plaintiff. The plaintiff asserts that Teo is "dishonest, lacks probity and has low commercial morality". The plaintiff asserts that Teo controls, or at least manages, Leader C Food and Taha Food. The plaintiff asserts that Teo "will go to lengths to ensure that he makes maximum profit", to the plaintiff's "detriment".

[91] The plaintiff avers that they "verily believe" that as Teo is involved in Leader Food's and Taha Food's management, "there is a risk that he will cause Leader Food and Taha Food to dissipate assets to defeat any judgment" D that the plaintiff may obtain against them.

[92] Along with the *ex parte Mareva* injunction, the plaintiff also obtained an *Anton Piller* Order against Teo, Leader Food and Taha Food. In the enforcement of the *Anton Piller* Order, the plaintiff avers that Teo, Leader Food and Taha Food were not compliant, and that they attempted to E withhold evidence from being discovered. The plaintiff asserts that Teo, Leader Food and Taha Food have a propensity to breach court orders and to hide evidence. And so, it is "conceivable" that they may dissipate assets to avoid a judgment.

F **[93]** I find that it may well be "conceivable" that Teo, Leader Food and Taha Food – and most defendants in any monetary claim, for that matter – may dissipate their assets to thwart an ultimate judgment. But this conception, without evaluable or measurable evidence, remains a conjecture. There must be an evidential basis to demonstrate a real risk of dissipation.

G **[94]** In my judgment, these are the facts and factors that arise against the plaintiff's assertion that Leader Food and Taha Food will likely dissipate their assets:

(i) Leader Food and Taha Food are separate incorporated entities. They are businesses. They are under the management of their directors, who H have duties to their shareholders.

(ii) Right up this juncture, they appear to be vigorously contesting the plaintiff's claim against them.

(iii) The plaintiff is not Leader Food's and Taha Food's only customer. I They have other customers of their own.

(iv) As for common customers, it was submitted that the plaintiff's top 20 customers are not in the list of Leader Food's and Taha Food's list of customers. This appears to refute the plaintiff's allegation that Teo diverted the plaintiff's customers to Leader Food and Taha Food.

(v) Since the *ex parte Mareva* injunction, Leader Food and Taha Food cannot operate their bank accounts. Monies can be deposited into the accounts but monies cannot be withdrawn. On every occasion that they have needed to make payment from their accounts, they have had to get the plaintiff's approval. They assert that as a result, they have had to disclose their pricing trade secrets to the plaintiff. As a further consequence, they have lost their competitive edge as against the plaintiff. The plaintiff is their competitor. Their competitor now controls their payment process.

(vi) They each cannot utilise any part of the *Mareva* amount of RM1,116,617.64 of their own money to run their businesses.

(vii) There is no direct evidence of a real risk that Leader Food and Taha Food are likely to dissipate their assets for the specific purpose of impeding a possible judgment against them.

(viii) There is no evidence that has a real and material bearing that points to a real risk that Leader Food and Taha Food are likely to dissipate their assets. And there is no evidence that justifies an inference of that risk.

(ix) The mere allegations that Teo is dishonest, and that he will cause Leader Food and Taha Food to dissipate assets, do not necessarily infer that there is a real risk that they will dissipate assets. And I find that the plaintiff's allegations do not infer that risk.

(x) The authorities, particularly *Lee Kai Wuen* (*supra*), instruct me that I cannot make the presumption that Teo's alleged dishonesty and misconduct necessarily leads to a real risk of dissipation by Leader Food and Taha Food.

(xi) To grant a *Mareva* injunction against Leader Food and Taha Food, at this interlocutory stage, would give to the plaintiff, in my view, an unfair advance security for a judgment that is not yet a foregone conclusion.

[95] I therefore find that the plaintiff has not demonstrated that there is a real risk that Leader Food and Taha Food are likely to dissipate their assets, intended specifically to frustrate a possible judgment in the plaintiff's favour.

A *Should A Mareva Injunction Be Ordered Against Teo?*

[96] The plaintiff endeavours to demonstrate a real risk of dissipation by asserting the facts that they rely on to support their pleaded cause against Teo, which includes – Teo breached statutory, fiduciary and confidence duties to the plaintiff; Teo set up Leader Food and Taha Food, which are
B competing businesses; Teo diverted the plaintiff's suppliers and customers to Leader Food and Taha Food.

[97] The conclusion that the plaintiff wants the court to draw from these assertions is that, fundamentally, Teo is dishonest. And because he is
C dishonest, he will likely dissipate his assets so that he can circumvent a judgment against him.

[98] In my judgment, in additional to the facts and factors relating to Leader Food and Taha Food that I alluded to above, these are the facts and factors that bear against the plaintiff's assertion that Teo will likely dissipate
D his assets:

(i) Teo denies the charges levelled against him. In fact, Teo lodged a defence and mounted a counterclaim against the plaintiff.

(ii) Teo alleges that the persons who truly control and manage the plaintiff
E are Pamella Chiang and Yurisa Chiang, not him.

(iii) Apart from the RM10,000 allocated to Teo every month, Teo cannot utilise the *Mareva* amount of RM1,116,617.64 of his own money for his and his family's use.

(iv) Teo has a young family, with a three-year-old child.

F

(v) Teo refutes the allegation of dishonesty and misconduct by assertions that include the following. First, the plaintiff is in the dried fruits, dates, nuts, spices and herbs industry. Teo asserts that the information circulating in this industry, which the plaintiff alleges is confidential, is not confidential. Teo asserts that he does not owe the plaintiff a duty
G of confidence. The veracity of each side's assertions will be determined at trial, not at this interlocutory stage.

(vi) Also, Teo asserts that he did not cause the plaintiff to purchase products from Leader Food at a higher price than the plaintiff would
H have paid to other suppliers, to make secret profits. He challenges the plaintiff to prove the allegation that he did. Similarly, the veracity of either side's assertions will be determined at trial, not at this interlocutory juncture.

(vii) Further, Teo asserts that the plaintiff is not in the business of
I processing dried fruits and dates. The plaintiff imports dried fruits and dates for wholesale distribution in the local and regional market. Teo asserts that there is no exclusivity in this business. The plaintiff's

suppliers and customers are also the plaintiff's competitors' suppliers and customers. Such as Leader Food and Taha Food. That is the reason that the plaintiff, Leader Food and Taha Food have common suppliers and common customers. Teo asserts that in the circumstances, he was not dishonest, nor did he breach his duties to the plaintiff.

(viii) The plaintiff's assertions and Teo's opposite assertions will all be tested on their veracity at trial. But the *Mareva* injunction is sought at this interlocutory juncture, when I am not to minutely examine the affidavit evidence to ascertain the veracity of it all. I am only considering if the plaintiff has shown evidence that satisfactorily point to a real risk of dissipation, according to the standards that the case law authorities demand.

(ix) There is no direct evidence of a real risk that Teo is likely to dissipate his assets for the intended purpose of circumventing a judgment against him.

(x) There is no evidence that has a real and material bearing on such a risk. And there is no evidence that justifies an inference of that risk.

(xi) The mere allegation that Teo is dishonest, does not necessarily infer that there is a real risk that he will dissipate assets. And I hold that the plaintiff's allegations against Teo do not provide a sufficient basis to infer that risk.

(xii) Again, the authorities, particularly *Lee Kai Wuen* (*supra*), oblige me not to make the presumption that Teo's alleged dishonesty and misconduct necessarily lead to a real risk that he will dissipate his assets.

(xii) And similarly, to grant a *Mareva* injunction against Teo would give, in my view, an unfair advance security for a possible judgment that the plaintiff has to first go through a trial process to obtain.

Balance Of Convenience

[99] The balance of convenience issue is usually canvassed and argued in interlocutory injunction applications. The balance of convenience principle compels the court to consider whether it is more just to grant the injunction than not to grant the injunction. Put differently, the court has to consider and decide which alternative will cause more hardship – the hardship caused to the applicant if the injunction is not granted, or the hardship caused to the opposite side if the injunction is granted.

[100] This balance of convenience test was propounded in the landmark case of *American Cyanamid Co v. Ethicon Ltd* [1975] AC 396, [1975] 1 All ER 504, [1975] 2 WLR 316, and the seminal case of *Keet Gerald Francis Noel John v. Mohd Noor Abdullah & Ors* [1995] 1 CLJ 293; [1995] 1 MLJ 193; [1995] 2 AMR 1859 (CA).

[101] But the issue that I am addressing here is – is the balance of convenience principle applicable to an application for a *Mareva* injunction?

[102] The issue was answered by the Court of Appeal in *Lee Kui Wuen* (*supra*), where the following principles were propounded:

(i) There is a distinction between *Mareva* injunctions and other "non-*Mareva*" interlocutory injunctions pending trial.

(ii) The form of interlocutory injunctions sought in *American Cyanamid* (*supra*) and *Keet Gerald Francis Noel John* (*supra*) were the usual kind of interlocutory injunctions that relate to the reliefs claimed in the "pleaded causes of action". The basis for such injunctions is the cause filed and reliefs sought by the plaintiff against the defendant.

(iii) *Mareva* and *Mareva*-type injunctions are of "a different character". A *Mareva* injunction is not one of the final reliefs sought. A *Mareva* injunction "bears no dependence on the final relief" of the cause.

(iv) Instead, the purpose of a *Mareva* injunction is "to prevent an abuse of the legal process" where a party who is facing judgment intentionally dissipates the assets in question, to avoid having to satisfy the judgment. The balance of convenience is not one of the appropriate criteria for consideration when the court is deciding whether to grant a *Mareva* or *Mareva*-type injunction.

(v) So, the balance of convenience criterion and other related factors such as "the adequacy of damages" or the irreparability of the damage that may be caused if the interlocutory injunction is not granted – are not factors that need to be considered in a *Mareva* application.

(vi) The elements that need to be satisfied to obtain a *Mareva* or *Mareva*-type injunction remain only these – "a good arguable case", "assets in the jurisdiction", and "a real risk of dissipation of assets" intentioned to render a judgment "nugatory".

[103] In *Lee Kai Wuen* (*supra*), the Court of Appeal, recently, through the elucidation of His Lordship Darryl Goon Siew Chye JCA, pronounced:

> Balance of convenience
>
> [112] *There have been continuing reports of cases that have made reference to the issue of balance of convenience,* both by counsel and also in some cases by the court, *in regard to applications for a Mareva injunction,* see *eg*, *Bumi Armada Navigation Sdn Bhd v. Mirza Marine Sdn Bhd* [2015] AMEJ 706; [2015] 5 CLJ 652; *Metrowangsa Asset Management Sdn Bhd & Anor v. Ahmad bin Hj Hassan & 4 Ors* [2004] 4 AMR 30; [2005] 1 MLJ 654; *Ananda Kumar Krishnan v. LS Fishery Sdn Bhd & Ors* [2021] AMEJ 0301; [2021] 1 LNS 641; *EHQ Projects Sdn Bhd & 2 Ors v. Equipro Sdn Bhd & 3 Ors* [2007] AMEJ 0154;

[2008] 7 CLJ 343; *Bright Rims Manufacturing Sdn Bhd v. Victor Taichung Machinery Works Co Ltd & Anor* [2007] 4 AMR 648; [2007] 4 CLJ 230; *Dynasty Rangers (M) Sdn Bhd v. SBSK Plantations Sdn Bhd* [2001] 1 MLJU 439.

[113] In *Tsoi Ping Kwan v. Loh Lai Ngoh & Anor* [1997] 3 AMR 2875 at 2878 and 2880-2881; [1997] 3 CLJ 552 at 554 and 556, Gopal Sri Ram JCA delivering the judgment of this court stated as follows:

> There are several issues upon which the disputants before us stand in disagreement. However, we find it necessary to deal with only two of them. ... *The second relates to the question where the balance of convenience or, more appropriately, the balance of justice lies. In other words, whether justice favours the grant of a Mareva or its refusal.* ...
>
> Turning to the second issue, it is to be noted that the learned Judge, after weighting all relevant factors came to the conclusion that the balance of convenience lay in favour of refusing a *Mareva.* He said:
>
> Damages are an adequate remedy to the plaintiff as he will be in a position to quantify his claim in money terms if it is found at trial that the 1st defendant was a constructive trustee of his shares. However, the 2nd defendant will be immobilised by the injunction and the damages suffered will not be readily quantifiable. As such damages will not be an adequate remedy to the 2nd defendant and the balance of convenience lies in favour of refusing the injunction.

[114] The appeal before the court in *Tsoi Ping Kwan* was one against the refusal by the High Court to grant a *Mareva* injunction. Although the appeal was dismissed, it was dismissed on the ground that the learned judge had rightly exercised his discretion in refusing to grant the *Mareva* injunction sought, having concluded that the balance of convenience was against the grant of the *Mareva* injunction. *However,* from the passage quoted from the decision of the High Court, *it would appear that the decision of the High Court was based not only upon a balance of convenience but also on a conclusion that damages was an adequate remedy;* in other words, the plaintiff would not suffer any irreparable damage should the *Mareva* injunction be refused. The requirement of irreparable damage is yet another factor that would in our view, and with respect, be regarded as being alien to the grant of a *Mareva* type of injunction for the reasons addressed above.

[115] It would seem to us that *in all these cases where the balance of convenience vis-à-vis the grant of a Mareva injunction* was considered, *arose from, with respect, an error in conflating the requirements for the grant of non-Mareva type interlocutory injunctions, with Mareva injunctions* properly so called.

[116] *The balance of convenience is a legal consideration of some antiquity.* In *Mitchell v. Henry* (1880) 15 Ch D 181 at 191 and 192, a case involving an allegation of a trade mark infringement, James LJ *had regard to the balance of convenience* and *dealt with it* as follows *in an application for an interlocutory injunction: …*

A [117] In *American Cyanamid Co v. Ethicon* [1975] AC 396, Lord Diplock's *employment of this consideration* was predicated on the following, as His Lordship explained in p. 406 of the report:

> … The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could
B not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated
C under the plaintiff's undertaking in damages if the uncertainty were resolved in the defendant's favour at the trial. *The court must weigh one need against another and determine where "the balance of convenience" lies.*

D [118] *However, the interlocutory injunctions that Lord Diplock was dealing with was not of a Mareva type of injunction (see also* the decision of this court in *Keet Gerald Francis Noel John v. Mohd Noor bin Abdullah & 2 Ors* [1995] 2 AMR 1859; [1995] 1 MLJ 193). *The interlocutory injunction that Lord Diplock was concerned with in American Cyanamid was, in interlocutory form, an injunction that a plaintiff was entitled to as a relief based on a pleaded cause of action.* As Lord Diplock stated in *Siskina (Owners of Cargo Lately Laden on Board) & Ors*
E *v. Distos Compania Naviera SA* [1979] AC 210 at 249, *"The distinction drawn by the appellants between an interlocutory and final injunction is merely a matter of form. There must be some underlying cause of action to enable the court to grant an injunction. If no such right is established then neither type of injunction can be ordered"*.

F [119] As has already been pointed out, *a Mareva injunction is an injunction of quite a different character. It is not the final remedy sought in a cause. Although relevant to, it bears no dependence on, the final relief that is sought in an action* (see statement by Mustill J in *Ninemia Maritime Corporation, supra*). *In none of the authoritative cases in which the Mareva injunction was introduced was it ever stated or required that the balance of convenience is a criterion to be met* (see *Zainal Abidin*
G *bin Haji Abdul Rahman v. Century Hotel Sdn Bhd* [1982] 1 MLJ 260; *Nippon Yusen Kaisha v. Karageorgis* [1975] 1 WLR 1093; *Mareva Compania Naviera SA v. International Bulk Carriers SA* [1975] 2 Lloyd's Rep 509; and *Rasu Maritima SA v. Perusahaan Pertambangan Minyak dan Gas Bumi Negara* [1977] 3 WLR 518).

H [120] *The jurisdiction* exercised by courts *in the grant of Mareva injunctions is one to prevent an abuse of the legal process* in cases *where there is a real risk* that a litigant facing potential liability may *seek to render any judgment* that may finally be entered against him impotent by dissipating or disposing his assets.

I [121] *Where it is demonstrated that such a risk exists, we do not see any room for a consideration of the balance of convenience.* Seeking to defeat a judgment of the court in such a fashion cannot be countenanced by any inconvenience that may be proffered. *It is therefore important to distinguish between the basis*

and criteria for the grant of a non-Mareva injunction from that of a Mareva injunction (see the analysis in *Zschimmer & Schwarz GmbH & Co KG Chemische Fabriken v. Persons Unknown & Anor* [2020] AMEJ 1876; [2021] 7 MLJ 178). In a roundabout way, this distinction also brings home the point, again, that vital to the grant of a *Mareva* injunction is evidence, direct or indirect, of a real risk of dissipation or disposal of assets to defeat a judgment of the court. It is only where such a risk is properly established that a court would impose what can potentially be a burdensome and harsh order; even before the merits of the claim have yet to be finally determined.

[122] *We therefore doubt that the balance of convenience is, or was ever, a criterion that needs be considered by a court when considering the grant of a Mareva injunction*. This is perhaps significant enough a point for the Federal Court, should an opportunity present, to address and to settle any doubt that may exist. (emphasis added)

Decision

[104] In all the premises, E5 – the plaintiff's *inter partes* application for a *Mareva* injunction against Teo, Leader Food and Taha Food – is dismissed with costs, subject to the allocator. The plaintiff is to pay Teo costs of RM30,000 and the plaintiff is to pay Leader Food and Taha Food costs of RM15,000, forthwith and in any event by 25 July 2022.

Conclusion

[105] Enclosure 30 – Leader Food's and Taha Food's application to set aside the *ex parte Mareva* injunction is allowed with costs, and with Leader Food's and Taha Food's damages to be assessed, because the plaintiff did not comply with the requirements of O. 29 r. 1(2) and O. 29 r. 1(2A) of the ROC.

[106] Enclosure 32 – Teo's application to set aside the *ex parte Mareva* injunction is also allowed with costs, and with Teo's damages to be assessed, for the same reasons.

[107] Enclosure 5 – the plaintiff's *inter partes* application for a *Mareva* injunction is dismissed with costs, on the main ground that the plaintiff has not demonstrated that there is a real risk of Teo, Leader Food and Taha Food dissipating their assets with the intentional purpose of making nugatory a possible judgment that the plaintiff may ultimately obtain against them.